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TCA Global Credit Master Fund, LP

**UNITED STATES BANKRUPTCY COURT****NORTHERN DISTRICT OF CALIFORNIA****SAN FRANCISCO DIVISION**

IN RE:

BLUE EARTH, INC., et al.,

Debtors,

Case No. 16-30296-DM

Chapter 11

(Jointly Administered)

**MOTION TO DEEM LATE FILED CLAIMS  
TIMELY**Hearing InformationDate: June 10, 2016<sup>1</sup>

Time: 11:30 a.m.

Judge: Dennis Montali

Ct rm: 17, 16th Floor

UNITED STATES BANKRUPTCY  
COURT450 Golden Gate Avenue,  
San Francisco, California 94102

TCA Global Credit Master Fund, LP (**TCA** or **movant**), by and through its undersigned counsel, hereby files this motion for entry of an order deeming claim no. 29-1 (case no. 16-30296) and claim no. 5-1 (case no. 16-30297) (the **movant's claims**) as timely filed. In support of the motion, movant states as follows:

<sup>1</sup> A Motion to Shorten Notice, in accordance with local rule 9006-1 and this Court's practices and procedures, is being filed for consideration in conjunction with this Motion.

1    **I.      Background**

2            On March 21, 2016, Blue Earth, Inc. and Blue Earth Tech, Inc. (collectively, the **debtors**)  
3 each filed a voluntary petition in this Court for relief under Chapter 11 of the Bankruptcy Code.  
4 Since that time, the debtors have operated as debtors-in-possession pursuant to sections 1107 and  
5 1108 of the Bankruptcy Code.

6            Pursuant to a pre-petition Credit Agreement, and as reflected in the debtors' schedules and  
7 first day filings, as of the petition date the amount owed to movant by the debtors is \$916,239.01.<sup>2</sup>

8            According to the Court's order dated March 30, 2016 (ECF No. 46) (the **order shortening**  
9 **bar date**), the proof of claim deadline was radically shortened from one-hundred and twenty (120)  
10 days from the petition date, or July 25, 2016 (the **original claims bar deadline**)<sup>3</sup>, to fifty-three (53)  
11 days from the entry of the order shortening bar date or May 23, 2016 (the **shortened claims bar**  
12 **deadline**).

13            Undersigned counsel filed its notice of appearance on May 27, 2016 (ECF No. 148), and  
14 movant's claims were filed with the Court's claim register and mailed to the debtors' servicing agent  
15 on May 27, 2016.

16    **II.      Jurisdiction**

17            This Court has jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core  
18 proceeding within the meaning of 28 U.S.C. § 157 (b)(2). Venue is proper pursuant to 28 U.S.C. §§  
19 1408 and 1409.

20    **III.     Relief Requested**

21            Through this motion, the movant requests entry of an order deeming the movant's claims as  
22 timely filed.

23            Undersigned counsel has contacted counsel for the debtors and counsel for the Official  
24 Committee of Unsecured Creditors, and as of the filing of this motion, neither party has yet to  
25 \_\_\_\_\_

26    <sup>2</sup> Pursuant to the pre-petition February 24, 2015 Second Amendment to the Credit Agreement, movant loaned the debtors  
27 \$3,000,000, secured by that certain collateral as more fully detailed in the Credit Agreement. A true and correct copy of  
the Credit Agreement is attached as **Exhibit A** to movant's claims.

28    <sup>3</sup> Local Rule 3003-1 expressly provides that, unless otherwise ordered by the Court, a proof of claim shall be filed in a  
chapter 11 case within 90 days after the first date set for the meeting of creditors.

1 indicate their consent to or opposition of the relief requested herein. In the event the debtors and  
2 Committee consent to the relief requested in the motion, undersigned counsel will upload a  
3 stipulation and order for the Court's consideration.

#### 4 **IV. Support for Relief Requested**

5 Under *Pioneer Investment Services Co. v. Brunswick Associates L.P.*, 507 U.S. 380, 113  
6 S.Ct. 1489 (1993), the court must consider prejudice to the debtor, length of the delay, and reason for  
7 the delay in determining whether the claimant's neglect was excusable. In reaching its decision, the  
8 court reviewed the meaning of excusable neglect in the context of analogous rules that allow for late  
9 filings. It stated that "for purposes of Rule 60(b), 'excusable neglect' is understood to encompass  
10 situations in which the failure to comply with a filing deadline is attributable to negligence." *Id.* at  
11 394, 113 S.Ct. at 1497. The court concluded that whether a party's neglect of a deadline may be  
12 excused is an equitable decision turning on "all relevant circumstances surrounding the party's  
13 omission." *Id.* at 395, 113 S.Ct. at 1498 (citations and footnotes omitted).

14 Adopting the Ninth Circuit's approach in *Dix v. Johnson*, 95 B.R. 134 (9th Cir. BAP 1988),  
15 the *Pioneer* court listed several factors to be considered, including (1) the danger of prejudice to the  
16 debtor; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the  
17 delay; (4) whether the delay was within the reasonable control of the late party; and (5) whether the  
18 late party acted in good faith. *Id.* In the Ninth Circuit excusable neglect is "remedial in nature and  
19 . . . must be liberally applied." *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1262 (9th Cir.  
20 2010) (emphasis added).

21 Reviewing these five factors, it is respectfully submitted that movant's claims should be  
22 deemed timely filed. **First**, there is no danger of prejudice to the debtors. The debtors, and all other  
23 interested parties, were fully aware of movant's claims prior to the petition date, as evidenced by a  
24 multitude of filings, including (i) the debtors' schedules<sup>4</sup>, which identified the movant's claims in a  
25 substantially similar, and indeed higher amount, as **undisputed**; (ii) the debtors' DIP financing  
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<sup>4</sup> See ECF No. 1 in Case No. 16-30296 and ECF No. 1 in Case No. 16-30297.

1 motion<sup>5</sup> which specifically admitted movant's claims (including movant's liens and the collateral  
2 encumbered by such liens) in the "Summary of Other Prepetition Secured Debt" found on page 16 of  
3 the DIP financing motion; and (iii) the express exclusion of the collateral securing movant's claims  
4 from any super priority liens awarded to the DIP lender or other relief awarded to debtor and DIP  
5 lenders pursuant to the DIP financing motion.<sup>6</sup>

6 Moreover, the debtors' disclosure statement (ECF No. 131) has not yet been approved, and it  
7 itself: (i) expressly provides that "[a]s of the Petition Date, TCA asserted a Claim in the amount of  
8 \$916,378.91", pg. 28; (ii) details a default under movant's applicable loan documents as one of the  
9 "Events Leading to Chapter 11 Filing", pg. 29; (iii) identifies movant's lien on the Sumter facility in  
10 the "Post-Confirmation Budget" and accounts for debt and cash flow associated with movant's debt  
11 in financial projections, Exhibit "2"; and (iv) affords movant treatment in the Liquidation Analysis,  
12 Exhibit "3".

13 **Second**, the delay in the filing of movant's claims is minimal as movant's claims were filed  
14 within four (4) days of the shortened claims bar deadline and nearly two months prior to the  
15 expiration of the original claims bar date. In the words of the debtors themselves, the sole impetus  
16 for radically shortening the claims bar deadline was "to ascertain the universe of claims against the  
17 Debtors' estates before they solicit acceptances for their proposed plan." (emphasis added). Here,  
18 the inconsequential delay will have no impact upon the debtors' stated goal in seeking to shorten the  
19 claims bar date because *inter alia*: (i) the disclosure statement has yet to be approved by this Court,  
20 (ii) a hearing to consider confirmation of the debtors' joint plan of reorganization has not yet been  
21 scheduled, and (iii) the debtors are prohibited from soliciting acceptances of their proposed plan at  
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24 <sup>5</sup> The "DIP financing motion" shall mean the debtors' motion for interim and final orders (i) authorizing the debtors to (a)  
25 obtain postpetition senior secured superpriority financing pursuant to 11 U.S.C. §§ 361, 362, 363(c), 363(e), 364(c),  
26 364(d)(1), 364(e) and 507 and (b) utilize cash collateral, (ii) granting priming liens, priority liens and superpriority  
27 claims to the DIP lender, (iii) granting adequate protection to certain prepetition secured parties, (iv) scheduling a final  
28 hearing pursuant to Bankruptcy Rules 4001(b) and (c) and (v) granting related relief (ECF No. 11)

<sup>6</sup> Even if movant's claims were to be disallowed as untimely, movant's lien would survive against the debtors' collateral.  
See *In re Shelton*, 735 F.3d 747, (8th Cir. 2013) (Holding that a secured creditor's lien was not void due solely to the fact  
that the secured creditor filed an untimely proof of claim). Thus, providing for specific plan treatment on account of  
movant's claims in all probability will assist (rather than prejudice) the debtors' reorganization efforts.

1 this juncture. Furthermore, as previously stated, both the debtors and DIP lenders were on actual  
2 notice of the movant's claims.

3 **Third**, the delay in filing the movant's claims was caused by movant's reliance upon the  
4 original claims bar deadline that movant relied upon when the debtors commenced the instant cases  
5 and continued to be reflected as the claims bar deadline in the docket for Case No. 16-30297 on the  
6 date movant filed its claims and is still reflected as the correct claims bar deadline as of the date of  
7 this motion in Case No. 16-30297.

8 **Fourth**, movant asserts that the short delay in filing the claims were beyond its control  
9 because the short delay arose from both the confusion as to whether movant was required to file a  
10 claim and the deadline by which movant was required to file its claims caused by, *inter alia*: (i)  
11 voluminous first day filings served upon movant that obscured the debtors request for a radically  
12 shortened bar date, (ii) conflicting claims bar deadlines reflected in the Court's bar date order and the  
13 docket for Case No. 16-30297; (iii) debtors' scheduling the movants' debt as undisputed, (iv) debtors  
14 and DIP lenders expressed acknowledgement of movant's claims in the DIP financing motion and  
15 the exclusion of movant's collateral from any relief granted to lenders in the DIP financing motion,  
16 and (v) the local rules of the Northern District of California generally setting bar dates in chapter 11  
17 cases 90 days from the first meeting of creditors. Even absent the confusion associated with whether  
18 a claim was required to be filed given the undisputed status of movants' claims, the Ninth Circuit has  
19 expressly found excusable neglect where an attorney misread the applicable deadline because of a  
20 "calendaring" mistake. *See Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1261 (9th Cir. 2010).  
21 Here, movant's reliance on the original bar date that is still reflected in the docket for Case No. 16-  
22 30297 was an innocent calendaring mistake caused by the existence of conflicting bar dates.

23 **Fifth**, movant acted in good faith, as immediately upon discovery of the order shortening bar  
24 date: (i) movant's counsel filed a notice of appearance (ECF No. 148); (ii) movant's counsel  
25 contacted counsel for the debtors' and the Committee in an effort to consensually resolve any notice  
26 issues related to movant's claims; (iii) filed movant's claims with the Court's claim register and with  
27 the debtors' servicing agent in an amount less than that originally scheduled by the debtors; and (iv)  
28 acted diligently in seeking the relief sought in the instant motion.

1           Reviewing these five factors, it is respectfully submitted that movant's claims should be  
2 deemed timely filed. There is no danger of prejudice to the debtors, the DIP lenders, or any  
3 interested party arising from the relief requested, as the debtors, the DIP lender, and all interested  
4 parties were well aware of movant's claims prior to the May 23, 2016 bar date set by the Court as  
5 evidenced by the debtors' schedules, DIP financing motion, and disclosure statement. The delay in  
6 the filing of movant's claims should have no impact upon these proceedings, and such delay was  
7 caused by reliance upon the original claims bar deadline and the Court's docket for Case No. 16-  
8 30297 which still reflects the original claims bar deadline rather than the shortened claims bar  
9 deadline.

10           Accordingly, for all of the foregoing reasons, the Court should enter an order granting the  
11 instant motion and deem movant's claims timely filed.

12 Dated: June 2, 2016

Respectfully submitted,

**AKERMAN LLP**

By: /s/ Justin D. Balser

Justin D. Balser

Katalina Baumann

Attorneys for Creditor

TCA Global Credit MasterFund, LP